In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1429

PARTICULAR CLEANERS, INC. and FRANCES ENTWISTLE,

Petitioners,

vs.

COMMONWEALTH EDISON COMPANY,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS

A Recent Eighth Circuit Case Is In Conflict With The Case At Bar

This brief is supplemental to Petitioners' Reply Brief and is being filed to advise this Court of a recent Eighth Circuit decision which is in conflict with the decision of the Seventh Circuit case at bar.

In the case at bar, the Court of Appeals for the Seventh Circuit held that the alleged discriminatory collection of security deposits by a utility, under authority of Illinois Commerce Commission General Order 172, does *not* con-

stitute conduct under color of law so as to subject the utility to 42 U.S.C. §1983. In sharp contrast, the Court of Appeals for the Eighth Circuit, on May 3, 1972, held that a utility's threat to terminate a subscriber's utility service without a prior hearing, constituted conduct under color of law thereby subjecting the utility to 42 U.S.C. §1983.

The Eighth Circuit case referred to is *Ihrke* v. *Northern States Power Company*, No. 71-1504 (8 Cir., May 3, 1972), not yet reported. In *Ihrke*, the district court had found, *inter alia*, that Northern's threat to terminate the Ihrkes' utility services without a prior hearing did not fall within the purview of the Civil Rights Act, 42 U.S.C. §1983, since Northern had not acted under color of state law. *Ihrke* v. *Northern States Power Co.*, 328 F.Supp. 404 (D. Minn., 1971). The Court of Appeals for the Eighth Circuit reversed, stating on page 8 of its official opinion:

> "By its own actions, the City of St. Paul has in effect given Northern a monopoly on the retail distribution of gas and electricity and as a practical matter, the Ihrkes could not buy these commodities from any other source. Under these circumstances, we think it is abundantly clear that the action of Northern in threatening to terminate the service to the Ihrkes was under "color of law" as used in 42 U.S.C. §1983, and the trial court's determination to the contrary was erroneous."

On May 2, 1972, just one day prior to the Eighth Circuit decision in *Ihrke*, the District Court for the Northern District of Ohio, Western Division, also held that action of a public utility "which comes under the umbrella of a state statute or state authorized regulation constitutes state action." *Palmer* v. *Columbia Gas Company of Ohio*, Civil No. C 72-14 (N.D. Ohio, May 2, 1972), not yet reported.

Petitioners' Main Brief brought out the conflict in principle between the Fourth and Fifth Circuit Courts of Appeals on the one hand, and the Seventh Circuit Court of Appeals on the other hand, as to what action of a utility constitutes "state action." Now the Eighth Circuit is also in conflict with the Seventh Circuit as to whether a utility is subject to the Civil Rights Act. The immense public interest involved here (as demonstrated by the increasing number of cases concerned with the issue) and the conflict between the circuits render it desirable for a Writ of Certiorari to be issued by this Court.*

Respectfully submitted,

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* Further, this Court has recently implied that an electric utility's actions may fall within the purview of the Civil Rights Act. In *Moose Lodge No. 107* v. *Irvis* (Docket No. 70-75, decided by this Court on June 12, 1972), this Court stated that "Since *state-furnished services* include such necessities of life as electricity, water, and police and fire protection . . . ." (Emphasis added)